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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the constitutionality of the federal excise tax imposed upon the use of civil aircraft by Section 4491 of the Internal Revenue Code of 1954 (26 U.S.C.), as applied to aircraft owned by petitioner and used for official purposes.[1] In this refund suit brought in the United States District Court for the District of Massachusetts,[2] the district court upheld the tax as a valid user

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[1]The aircraft in question in this case is a helicopter purchased by petitioner in 1969 for use by the Massachusetts state police. Petitioner registered it with the Federal Aviation Administration as a public use aircraft and uses it primarily to promote highway safety. In performing that function, it serves as an airborne command post and provides transportation in medical emergencies. On occasion, the helicopter is also used in searches for criminals and escapees from correctional facilities.

[2]Petitioner sought the return of $130 in tax (plus interest and penalties) (Pet. App. A-5).

charge for services rendered (Pet. App. A-1 to A-4). The court of appeals affirmed on the same ground, stating that " '[n]o logical reason exists why users of the air transportation system should not pay their fair share of such costs' " (Pet. App. A-5 to A-10, quoting from *State of Texas* v. *United States*, 30 A.F.T.R. 2d 5935, 5938 (W.D. Tex.), affirmed *per curiam*, 31 A.F.T.R. 2d 1473 (C.A. 5)).

1. Section 4491 of the Code was enacted in connection with the Airport and Airway Development and the Airport and Airway Revenue Acts of 1970, 84 Stat. 219, 236. These statutes provide for substantial expansion and improvement of the airport and airway system, to be financed in large measure "through the imposition and application of airport and airway user charges" (H.R. Rep. No. 91-601, 91st Cong., 1st Sess., p. 1 (1969)), including an annual excise tax imposed upon the use of taxable civil aircraft under Section 4491. See H.R. Rep. No. 91-601, *supra*, at 38; S. Rep. No. 91-706, 91st Cong., 2d Sess., p. 5 (1970). "Taxable civil aircraft" is defined by the pertinent Treasury Regulations as any engine driven craft registered or required to be registered with the Federal Aviation Administration, including "civil aircraft owned by the United States and State and local governments." See Section 4492 of the Code; Treasury Regulations, Section 154.3-1(b)(2) (26 C.F.R.), Appendix, *infra*, p. 4a; H.R. Rep. No. 91-601, *supra*, at 48-49.

The direct link between the Development Act and the excise tax here in issue was established by Section 208 of the Airport and Airway Revenue Act, 84 Stat. 250, which created the Airport and Airway Trust Fund. This fund was to be the depository of the proceeds of the various airport and airway user charges, from which the airport development expenditures were to be made. H.R. Rep. No. 91-601, *supra*, at 41. Since the user charge imposed under Section 4491 was "based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system" (H.R. Rep. No. 91-601, *supra*, at 40), Congress eliminated the exemptions previously granted to state and local governments and to the federal government, with respect to the companion excise tax on the transportation of persons by air (Section 4261 of the 1954 Code). Section 205(a)(2) and (3) of the Airport and Airway Revenue Act, 84 Stat. 238.

2. Petitioner argues (Pet. 4-5) that in upholding the validity of the federal aircraft use tax, the decision below: (1) undermines the principle of intergovernmental tax immunity; (2) conflicts with *National League of Cities* v. *Usery*, 426 U.S. 833; and (3) conflicts with *State of Georgia* v. *United States*, N.D. Ga., No. 75-1155A, decided April 13, 1977, in which the district court ruled that the tax was unconstitutional as applied to aircraft owned by the states.

a. As the court of appeals correctly observed (Pet. App. A-7), the federal aircraft use tax is "a charge for services rendered * * * and represents a quid pro quo, and * * * as such, is outside the scope of the doctrine of implied intergovernmental tax immunity" (quoting from *State of Texas* v. *United States*, *supra*, 30 A.F.T.R. 2d at 5938). These user taxes or "charges" are specifically earmarked for air transportation development, and are paid into the Airport and Airway Trust Fund established solely for that purpose. In particular, they are to be utilized in the development of airports, from the planning stages through construction, and for the planning, research, development, operation and maintenance of air traffic control, air navigation, communications, and supporting services for the airway system. These latter services, provided almost

exclusively by the Federal Aviation Administration, are available to all users of the airway system, whether public or private. Thus, in withdrawing the exemptions from the companion air transportation excise tax previously extended to various governmental and educational organizations, the House Committee Report stated that "since this tax is now generally viewed as a user charge * * * there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities." H.R. Rep. No. 91-601, *supra*, at 46. See also 114 Cong. Rec. 8987 (1968).

There is a fundamental difference between a tax that is designed to produce revenue to support general governmental activities, and a user charge which is designed to recoup part of the cost of governmental facilities and services directly from those who benefit from them. Thus, in substantially analogous cases, this Court has held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, do not violate Article II, Section 10, clause 3 of the Constitution, which provides that "[n]o State shall * * * lay any Duty of Tonnage." See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261; *Huse* v. *Glover*, 119 U.S. 543; *Packet Co.* v. *St. Louis*, 100 U.S. 423; *Packet Co.* v. *Keokuk*, 95 U.S. 80, 84. Cf. *The Minnesota Rate Cases*, 230 U.S. 352, 405. See also *Head Money Cases*, 112 U.S. 580, 595-596. Similarly, the Court has upheld state motor vehicle license and registration fees levied as compensation for the use of highway facilities furnished by the state. See, *e.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542; *Aero Transit Co.* v. *Commissioner*, 332 U.S. 495; *Hendrick* v. *Maryland*, 235 U.S. 610.

Finally, the Court has sustained state and local enplaning charges upon commercial airline passengers as compensation for the use of state-provided airport facilities (*Evansville Airport* v. *Delta Airlines*, 405 U.S. 707), against the challenge that, because they were imposed upon vehicles or passengers in interstate as well as intrastate commerce, they impermissibly interfered with the former. As the Court stated in *Hendrick* v. *Maryland*, *supra*, 235 U.S. at 623-624, "there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

Here, too, the annual excise tax on the use of civil aircraft is a payment by the user for airport and airway facilities and services furnished by the federal government. Accordingly, petitioner can no more claim the right to free use of these facilities and services than it could, for example, post its mail without purchasing stamps.

At all events, petitioner's claim that there is an implied constitutional immunity of the states and localities from federal taxation is seriously open to question. The Court originally recognized such an immunity in *The Collector* v. *Day*, 11 Wall. 113, except where the states engage in business of a private non-governmental character (see, *e.g.*, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U.S. 360). But in *Helvering* v. *Gerhardt*, 304 U.S. 405, the Court sustained a federal income tax on salaries of employees of the bi-state Port of New York Authority. In so holding, the Court reaffirmed the distinction drawn by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, between the position of the national government (acting with powers of supremacy under the Constitution) and the states, which are not accorded such preeminent powers.

Similarly, in *New York* v. *United States*, 326 U.S. 572, the Court upheld a federal tax upon the sale of mineral water by the State of New York. While the case could have turned upon the distinction drawn in the earlier cases between governmental and private activities, none of the opinions of the members of the Court voting to sustain the tax rested upon that narrow ground. Rather, under the various tests suggested in the plurality opinions, the aircraft use tax at issue here would be valid.

Those tests are: (1) whether the tax is nondiscriminatory (326 U.S. at 582-584, Frankfurter, J.); (2) whether Congress expressly stated its intention that the tax apply to governmental organizations (*id.* at 584-586, Rutledge, J.); and (3) whether the tax unduly interferes with the performance of the sovereign functions of government, in the sense of actual impairment of state or city functions (*id.* at 586-590, Stone, C.J.). See also *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843-844 and nn. 13, 14; *id.* at 863-864 (Brennan, J., dissenting); McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. Rev. 485, 493 (1973). It is therefore not surprising that shortly after the decision in *New York* v. *United States*, *supra*, one commentator concluded that "since the beginning of 1938, it is apparent that the Court has rejected the reciprocal rule of tax immunity, returned to the basis of earlier decisions and reaffirmed Chief Justice Marshall's understanding that immunity doctrine protected the Federal Government against taxation by the states but did not equally shield the states against the exercise of the delegated and supreme taxing power of the Federal Government." Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3, 27 (1950).

b. Given the status of the aircraft excise tax as a user charge, this Court's decision in *National League of Cities* v. *Usery*, *supra*, does not control this case. There, the Court held that the 1974 amendments to the Fair Labor Standards Act that extended the Act's minimum wage and hour provisions to almost all employees of the states and their political subdivisions were unconstitutional. In so ruling, the Court concluded that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by * * * [the Commerce Clause]" (426 U.S. at 852). In the Court's view, "the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose" (*id.* at 849).

Here, however, the imposition of a nondiscriminatory charge for the use of federally-improved airport facilities is not comparable to the imposition of federal wages and hours standards with respect to state and local government employment. By imposing this user charge, Congress sought to require that all aircraft using the national airway system, including the aircraft of the states, pay their proportionate share of the cost of improving and maintaining the essential airport facilities.

c. While we believe that the court of appeals correctly upheld the constitutionality of the federal aircraft use tax as applied to the states, we agree with petitioner (Pet. 5, 7-8) that the decision below conflicts with that of the district court in *State of Georgia* v. *United States*, *supra*. Since the district court held the statute unconstitutional as applied to the states, that decision can only be reviewed by direct appeal to this Court under 28 U.S.C. 1252. The

Solicitor General has authorized a direct appeal in the *State of Georgia* case and our appeal will be docketed shortly. Hence, the issue in this case warrants plenary consideration by this Court.[3] Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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[3]In order to provide for congressional review of the airport improvement program, the tax at issue in this case is due to expire after July 1, 1980 (see 26 U.S.C. 4491(e)). See S. Rep. No. 91-706, *supra*, at 3. However, the considerations underlying the constitutional question are equally applicable to the federal air passenger ticket excise tax provided by 26 U.S.C. 4261. See *City of New York* v. *United States*, 394 F. Supp. 641 (S.D. N.Y.), affirmed *per curiam*, 538 F. 2d 308 (C.A. 2), certiorari denied, October 4, 1976 (No. 75-1684).

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4491 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, Pub. L. 91-258, 84 Stat. 236, 243]. IMPOSITION OF TAX.

(a) *Imposition of tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus
(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By whom paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or
(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a) (2) shall be reckoned proportionately

from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One tax liability per year.*—

(1) *In general.*—To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) *Cross reference.*—

For privilege of paying tax imposed by this section in installments, see section 6158.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

SEC. 4492 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, *supra*]. DEFINITIONS.

(a) *Taxable civil aircraft.*—For purposes of this subchapter, the term "taxable civil aircraft" means any engine driven aircraft—

(1) registered, or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a)), or

(2) which is not described in paragraph (1) but which is owned by or for a United States person.

(b) *Weight.*—For purposes of this subchapter, the term "maximum certificated takeoff weight" means the maximum such weight contained in the type certificate or airworthiness certificate.

(c) *Other definitions.*—For purposes of this subchapter—

(1) *Year.*—The term "year" means the one-year period beginning on July 1.

(2) *Use.*—The term "use" means use in the navigable airspace of the United States.

(3) *Navigable airspace of the United States.*—The term "navigable airspace of the United States" has the definition given to such term by section 101(24) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1301(24)), except that such term does not include the navigable airspace of the Commonwealth of Puerto Rico or of any possession of the United States.

Temporary Regulations in Connection with the Airport and Airway Revenue Act of 1970 (1954 Code) (26 C.F.R.):

§ 154.3-1 *Tax on use of civil aircraft.*

(a) *Purpose of this section.* In general, section 4491 of the Internal Revenue Code of 1954, as added by the Airport and Airway Revenue Act of 1970, imposes a tax upon the use, at any time during the taxable period, of any taxable civil aircraft in the navigable airspace of the United States. This tax is imposed upon such use during any taxable period beginning on July 1, 1970, and on each subsequent July 1 before July 1, 1980. This section sets forth rules as to the general applicability of the tax and also sets forth rules, as authorized by section 4493(a), to provide a method whereby certain lessees of taxable civil aircraft may elect to be liable for the tax. Further, this section provides administrative provisions relating to the payment of tax and the filing of tax returns.

(b) *Definitions.*—(1) Use. The term "use" means use in the navigable airspace of the United States, as

defined in section 4492(c)(3), except that such term does not include use by a manufacturer, dealer, wholesaler, retailer, exporter, or importer of aircraft solely for demonstration, testing, or delivery purposes. Mere possession of a civil aircraft does not constitute "use."

(2) *Taxable civil aircraft.*—The term "taxable civil aircraft" means any engine powered aircraft which is either registered or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(a)) or which is owned by or for a U.S. person. Such term includes civil aircraft owned by the United States and State and local governments. Military aircraft and aircraft of the National Guard are not within the definition of taxable civil aircraft.

* * * * *